Office Supreme Court, U.S.
FILED
JUL 27 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1781

In the Supreme Court of the United States

OCTOBER TERM, 1980

WILLIAM H. MCNICHOLS, JR., ET AL.,
PETITIONERS,

v.

MALCOLM BALDRIDGE, SECRETARY OF COMMERCE, ET AL.,
RESPONDENTS.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE TENTH DISTRICT

BRIEF OF PETITIONERS

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QUESTIONS PRESENTED

1. Are the addresses of living units in the City and County of Denver deemed by the Census Bureau to be vacant on April 1, 1980, protected by the privilege of confidentiality of 13 U.S.C. § 9?

2. Did the Order of the District Court, with its protective provisions, violate the privilege of confidentiality of 13 U.S.C. § 9?

3. Does the interpretation and application of the protection of the privilege of confidentiality afforded by 13 U.S.C. § 9 to the facts in this case by the Court of Appeals violate the Constitutional requirements of equal representation and one person-one vote?

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED i

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTIONS 2

CONSTITUTION, RULES AND STATUTE INVOLVED 2

STATEMENT OF THE CASE 6

A. Facts 6

B. Decisions Below 8

SUMMARY OF ARGUMENT 11

ARGUMENT 12

The interpretation and application of the privilege of confidentiality of 13 U.S.C. § 9 to the facts in this case by the Court of Appeals violates the constitutional requirements of equal representation and one person-one vote 12

The addresses of living units in the City deemed to be vacant on April 1, 1980 by the Census Bureau are not protected by the privilege of confidentiality of Section 9 of the Census Act 16

The Order of the District Court did not violate any privilege 22

CONCLUSION 23

APPENDICES

District Court Order..... A-1
Court of Appeals Opinion and Decision..... B-1

TABLE OF AUTHORITIES

CASES:

Baker v. *Carr*, 369 U.S. 186 (1962) 13
Carey v. *Klutznick*, No. 81-6042 (2nd Cir. 1981) 18
Cort v. *Ash* 422 U.S. 66 (1975) 17
Kirkpatrick v. *Preisler*, 394 U.S. 526 (1969) 12, 14
McNichols v. *Klutznick*, 644 F.2d 844 (10th Cir. 1981) 1, 11, 18
Northwest Airlines, Inc. v. *Transport Workers Union of America*, 451 U.S._____, 67 L.Ed.2d 750, 101 S.Ct. 1571 (1981) 17
Prigg v. *The Commonwealth of Pennsylvania*, 41 U.S. 539 (1842) 14
Reynolds v. *Simms*, 377 U.S. 533 (1964) 14
Seymour v. *Barabba*, 559 F.2d 806 (1977) 2
St. Regis Paper Co. v. *United States*, 368 U.S. 208 (1961) 17, 19, 20
United States v. *Bethlehem Steel Corp.*, 21 F.R.D. 568 (S.D.N.Y. 1958) 21
United States v. *Littles*, 321 F.Supp. 388 (D.Del. 1971) 21
United States v. *Missouri Pacific R.R. Co.*, 278 U.S. 269 (1929) 17
United States v. *Bryan*, 339 U.S. 323 (1949) 12
Universities Research Association v. *Coutu*, 450 U.S._____, 67 L.Ed 2d 662, 101 S.Ct. 1451 (1981) 17

Wells v. *Rockefeller*, 394 U.S. 542 (1969) 12
Westberry v. *Sanders*, 376 U.S. 1 (1964) 12

CONSTITUTIONS:

U.S. Constitution, Article I, Section 2 ..... 2, 8, 12
U.S. Constitution, Amendment XIV, Section 2 3
Colorado Constitution, Article V, Sections 44 through 48 14

STATUTES:

Census Act (Title 13, U.S.C.) ..... 4, 9, 10, 12, 15, 20, 22.
Section 9 ..... 4, 9, 10, 12, 16, 17, 19, 20, 22.
Section 9(a) (1) 5
Section 9(a) (2) 5
Section 9(a) (3) 5, 19
Section 141 6

Jurisdictional Statutes:
5 U.S.C. 552 8
28 U.S.C. 1292(b) 10
28 U.S.C. 1254 (l) 2
28 U.S.C. 1331 8
28 U.S.C. 1337 8
28 U.S.C. 1361 8
28 U.S.C. 2201 8
28 U.S.C. 2202 8

Colorado Revised Statutes:
2-1-101 C.R.S. 1973, *et seq.*, as amended 14
2-2-101 C.R.S. 1973, *et seq.*, as amended 14

RULES:

Rule 26(b) (1) Fed. R. Civ. Proc. 4
Rule 34(a) Fed. R. Civ. Proc. 3

MISCELLANEOUS:

Letter from Secretary of Commerce Luther H. Hodges to President Lyndon B. Johnson, reprinted in [1962] U.S. Code Cong. & Ad. News 3190, 3191 20

H.R. Report No. 2437, 87th Cong., 2nd Sess., 1-2 (1962) 20

H.R. Rep. No. 10569, 87th Cong., 2nd Sess. (1962), printed in Hearing before the Comm. and Post Office and Civil Serv., Confidentiality of Census Reports, 87th Cong., 2nd Sess. (1962) 20

S. Rep. No. 2218, 87th Cong., 2nd Sess. 2 (1962), reprinted in [1962] U.S. Code Cong. Ad. News 3188, 3189 19

8 *Wigmore, Evidence* § 2192 (McNaughton Rev. 1961) 13

49 U.S.L.W. 3826 2

49 U.S.L.W. 3931 2

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WILLIAM H. MCNICHOLS, JR., ET AL.,
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v.

MALCOLM BALDRIDGE, SECRETARY OF COMMERCE, ET AL.,
RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF PETITIONERS

OPINIONS BELOW

The order of the United States District Court for the District of Colorado (Carrigan, J.) is not officially reported but appears in the Appendix at page A-1. The opinion of Judge McKay for the Tenth Circuit Court of Appeals is reported at 644 F.2d 844 (10th Cir. 1981) and appears in the Appendix at page B-1. The captions in those proceedings included Philip M. Klutznick as the Secretary of the U.S. Department of Commerce, Vincent P. Barabba as the Director of the U.S. Bureau

of the Census, and Leo Schilling as the Regional Director of the U.S. Bureau of the Census; each of whom has been succeeded in office and has been replaced in the caption in This Court by Malcolm Baldridge, Daniel B. Levine and William Adams, respectively.[1]

JURISDICTION

The judgment of the Court of Appeals was entered on March 17, 1981, the Petition for Writ of Certiorari was filed April 24, 1981,[2] within ninety days of that decision, and the Writ of Certiorari was granted by This Court on June 15, 1981.[3] This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTION, RULES AND STATUTE INVOLVED

Clause 3 of Section 2 of Article I of the U.S. Constitution reads, in pertinent part, as follows:

> Representatives and direct taxes shall be apportioned among the several states which may be included within this union, according to their respective numbers, which shall be

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[1] Petitioners, the plaintiffs below, are William H. McNichols, Jr., a citizen and elector of the United States, of the State of Colorado and of the City and County of Denver and the Mayor of the City and County of Denver, and the City and County of Denver, a municipal corporation of the State of Colorado.

[2] 49 U.S.L.W. 3826

[3] 49 U.S.L.W. 3931

> determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three-fifths of all persons. The actual enumeration shall be made within three years after the first meeting of the congress of the United States, and within every subsequent term of ten years, in such manner as they shall by law direct.

Section 2 of the Fourteenth Amendment to the U.S. Constitution reads, in pertinent part, as follows:

> Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed.

Rule 34(a) of the Federal Rules of Civil Procedure (F.R.C.P.) reads as follows:

> Rule 34. Production of Documents and Things and Entry Upon Land for Inspection and Other Purposes.
>
> (a) SCOPE. Any party may serve on any other party a request (1) to produce and permit the party making the request, or someone acting on his behalf, to inspect and copy, any designated documents (including writings, drawings, graphs, charts, photographs, phono-records, and other data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form), or to inspect and copy, test, or sample any tangible things

which constitute or contain matters within the scope of Rule 26(b) and which are in the possession, custody or control of the party upon whom the request is served; or (2) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of Rule 26(b).

Rule 26(b) (1) F.R.C.P. reads as follows:

(b) SCOPE OF DISCOVERY. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) **In General.** Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

Section 9 of the Census Act, 13 U.S.C. § 9 reads as follows:

Sec. 9. Information as confidential; exception

(a) Neither the Secretary, nor any other officer or employee of the Department of Commerce or bureau or agency thereof, may, except as provided in section 8 of this title—

(1) use the information furnished under the provisions of this title for any purpose other than the statistical purposes for which it is supplied; or

(2) make any publication whereby the data furnished by any particular establishment or individual under this title can be identified; or

(3) permit anyone other than the sworn officers and employees of the Department or bureau or agency thereof to examine the individual reports.

No department, bureau, agency, officer, or employee of the Government, except the Secretary in carrying out the purposes of this title, shall require, for any reason, copies of census reports which have been retained by any such establishment or individual. Copies of census reports which have been so retained shall be immune from legal process, and shall not, without the consent of the individual or establishment concerned, be admitted as evidence or used for any purpose in any action, suit, or other judicial or administrative proceeding.

(b) The provisions of subsection (a) of this section relating to the confidential treatment of data for particular individuals and establishments, shall not apply to the censuses of governments provided for by subchapter III of chapter 5 of this title, nor to interim current data provided for by subchapter IV of chapter 5 of this title as to the subjects covered by censuses of governments, with respect to any information obtained therefor that is compiled from, or customarily provided in, public records.

STATEMENT OF THE CASE

A. Facts

In this action William H. McNichols, Jr., as an individual citizen and elector of the United States, of the State of Colorado, and of the City and County of Denver, and as the Mayor of the City and County of Denver, and the City and County of Denver (herein sometimes referred to collectively as "Denver") complain that the count of the population within Denver is inaccurate and has been inaccurately reported by the U.S. Census Bureau, an agency of the U.S. Department of Commerce (herein sometimes referred to as "Bureau"), which shall cause the improper apportionment of Congressional representation within the State of Colorado and the improper apportionment of Colorado State senators and representatives and deprive the people of the City and County certain statutory rights. Denver claims that the Bureau did not count all of the population in Denver and particularly those persons who should have been counted and who reside in living units which the Bureau deduced were vacant on Census Day.[4]

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[4] Census Day was declared to be April 1, 1980, as of which day the population of the United States would be counted. 13 U.S.C. 141.

In 1970 the Bureau certified that the population in Denver was 514,800 people. (J.A.30). The population for Denver has been consistently estimated and projected during the 1970's by the Denver Regional Council of Governments, a regional agency of the State of Colorado, not governed or controlled by Denver, as being above 520,000 persons. The Denver Regional Council of Governments estimate of Denver's population for 1977 was 522,100; for 1978, 522,500; for 1979, 521,700; and for 1980, 521,300. (J.A. 41). The Denver Regional Council of Governments has been making estimates and projections for population in the Denver Metropolitan area for 25 years. (J.A. 43).

Denver submits that its population is over 500,000 and bases its claim on the number of water and sewer taps permitted, the number of telephones installed, information contained in its Building Department records and its assessment records and information obtained from the Office of the Governor of the State of Colorado, the Denver Board of Realtors, the U.S. Post Office, and the Denver Regional Council of Governments. (J.A. 28-30).

Although the Bureau's preliminary figures were increased from 455,000 to 491,651, (J.A. 25) Denver registered its protest and made its challenge to the figures of the Bureau upon its receipt of these preliminary figures. (J.A. 26). Officials of the Bureau checked the status of occupancy of a few particular buildings which Denver claimed had fewer vacancies than were shown by the data from the Bureau (J.A. 60,61) and confirmed to Denver the number of vacancies in those particular buildings located in the city at the request of Denver. (J.A. 65-68).

Denver commenced and conducted a population and vacancy survey of its own which included surveying approximately one-third of the living units in the

city which were selected for examination due to the relatively high vacancy rate assigned to those areas by the Bureau. (J.A. 26-18, 88-110). The results of the population and vacancy survey of the city showed a 5.3% vacancy rate as apposed to the 9.6% vacancy rate of the Bureau; and that the Bureau indicated 46% more vacant units than did the survey of Denver. (J.A. 35).

The opinion of the Assessor of the City is that the vacancy rate for Denver on Census Day was 3%; (J.A. 37) and the opinion of one of the appraisers of the city was that the vacancy rate on Census Day was from 3% to 4%. (J.A. 40). The Bureau wrote off too many living units in Denver as vacant.

The statistics and data of the Bureau indicate that the average number of persons residing in a living unit in Denver is 2.2 persons (J.A. 62). The Regional Administrator of the Bureau admitted at the hearing on Denver's application for preliminary injunction that not every person in the city was counted by the Bureau in the 1980 Decennial Census. (J.A. 73).

B. Decisions Below

The jurisdiction of the U.S. District Court for the District of Colorado was invoked due to the existence of a federal question under 28 U.S.C. §§ 1331, 1337, 1361, 2201 and 2202, a claim under the Freedom of Information Act, 5 U.S.C. § 552, and a claim concerning violation of rights guaranteed by Article I, Section 2, Clause 3 of the Constitution of the United States of America.

Denver initially sought a temporary restraining order keeping open the Bureau's Denver offices. The parties agreed, however, that the offices could close so long as the Bureau kept its updated master address list, known as the Follow-up Address Registers (FARs), in Denver during this lawsuit. Denver then sought a preliminary injunction requiring, in essence, that the

Bureau cooperate with the city in verifying the vacancy data. The court did not rule on the preliminary injunction, and still has not, but focused instead on the question whether Denver should have access to the vacancy information in the FARs to check the Bureau's vacancy tabulations. After initially seeking the vacancy information in the FARs under the Freedom of Information Act, Petitioners sought production of the documents under the federal discovery rules. The Bureau maintained that the information in the FARs must remain confidential pursuant to a disclosure bar contained in 13 U.S.C. § 9.

The district court found that:

(1) There is no way that the actual effect of the definitional differences between the methodologies of Denver and the Bureau, if any there be, can be verified and evaluated unless Denver can discover the vacancy information in the FARs, which tell Denver which dwellings the Bureau counted as vacant as of April 1, 1980[5];

(2) To deny Denver discovery of this information will essentially deny it any meaningful ability to challenge the Bureau's determinations concerning the 1980 Decennial Census;

(3) Extremely important constitutional and statutory rights are at stake in this case. The final census count will affect Denver's representation in Congress and both houses of the Colorado General As-

[5] The government disregarded the results of the City's survey of one-third of the City which showed a substantially lower vacancy rate than that of the Bureau on the basis that the definitions and methodologies used by the City were incorrect and different from those of the Bureau and invalid. Due to the subjectivity of these matters, the only place to start comparison must be the data leading to the conclusions and the results.

sembly for the ensuing decade. Moreover, the population figure of 500,000 is a threshold of city size affecting both the state and federal grants; and

(4) The vacancies in dispute could make up the difference between the 491,000 which the Bureau proposes and the 500,000 which Denver claims is its population at a minimum.

The district court concluded that the purposes of Section 9 of Title 13, U.S.C. can be maintained in this case without denying Denver the right to discovery of documents clearly relevant and indispensable to its case.

On this rationale the court entered a multi-part discovery order:

(1) The government must produce the FARs, or alternatively, a list of vacant addresses culled from the FARs;
(2) all names and other identifying references must be deleted;
(3) all city employees given access to the information must take the same secrecy oath as Bureau employees;
(4) the information obtained may be used only to seek adjustment of the census; and
(5) Bureau officials may at their option accompany Denver employees seeking to verify the Bureau's vacancy data.

The district court certified its order for immediate appeal under 28 U.S.C. § 1292(b) and stayed its order temporarily.

The Court of Appeals stayed the discovery order of the District Court and granted permission to take the interlocutory appeal and assumed jurisdiction under 28 U.S.C. § 1292(b). The Court of Appeals reversed the

discovery order, holding that Congress had made the information sought by Petitioners immune from discovery and that there can be no judicial exception made to that immunity. 644 F2d 844 (10th Cir. 1981).

SUMMARY OF ARGUMENT

The Court of Appeals should not have approved the privilege of confidentiality proposed by the Bureau and its judgment should be reversed. The requirement imposed by This Court of a strict construction of any claimed exemption to the duty to give evidence and the right to receive evidence, particularly with respect to the Census Act, cannot result in the prohibition of the disclosure of addresses of supposedly vacant living units in Denver.

The words and phrases of the Census Act, its legislative history, and its purposes and structure clearly show that Congress did not intend that disclosure of addresses of supposedly vacant living units be denied to Denver and thus deprive it of any meaningful ability to assure the accuracy and completeness of the 1980 Decennial Census.

Without the disclosure of the addresses of those living units, the fundamental rights of equal representation and of the equality of each person's vote mandated by the people through the Constitution and the Congress through the Census Act cannot in this instance be protected and assured to the greatest extent possible.

The District Court included in its discovery order provisions which may go beyond the protections and requirements of the Census Act but that shall ensure not only that the integrity of the census data will be preserved, but also that the appearance of such integrity shall be put forth.

ARGUMENT

THE INTERPRETATION AND APPLICATION OF THE PRIVILEGE OF CONFIDENTIALITY OF 13 U.S.C. §9 TO THE FACTS IN THIS CASE BY THE COURT OF APPEALS VIOLATES THE CONSTITUTIONAL REQUIREMENTS OF EQUAL REPRESENTATION AND ONE PERSON-ONE VOTE

This Court has held that Article I, Section 2, of the Constitution means that "as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's," *Westbury* v. *Sanders*, 376 U.S. 1, 7-8 (1964), and that "our Constitution's plain objective [is to make] equal representation for equal numbers of people the fundamental goal" *id* at 18. See also *Wells* v. *Rockefeller*, 394 U.S. 542 (1969); *Kirkpatrick* v. *Preisler*, 394 U.S. 526 (1969).

This Court has also endorsed the principle that the people, through their courts, have a right to all evidence pertaining to the matter in litigation, and that any exemption from this rule must be examined closely and the interest to be protected by the exemption must outweigh the interest of the public in the litigation and in being made aware of all the relevant facts of the matter. In *United States* v. *Bryan*, 339 U.S. 323, 331 (1949), Chief Justice Vinson wrote for This Court:

> Certain exemptions from attending or, having attended, giving testimony are recognized by all courts. But every such exemption is grounded in a substantial individual interest which has been found, through centuries of

> experience, to outweigh the public interest in the search for truth. Dean Wigmore stated the proposition thus: "For more than three centuries it has now been recognized as a fundamental maxim that the public (in the words sanctioned by Lord Hardwicke) has a right to every man's evidence. When we come to examine the various claims of exemption we start with the primary assumption that there is a general duty to give what testimony one is capable of giving, and that any exceptions which may exist are distinctly exceptional, being so many derogations from a positive general rule."[6]

The Court continued, in giving guidance for the consideration of any exemption to this positive general rule, that each such exemption must be closely examined:

> Every exemption from testifying or producing records thus presupposes a very real interest to be protected. If a privilege based upon that interest is asserted, its validity must be assessed. *Id.* at 332.

As against the interest of the Bureau of expanding the cloak of secrecy over all of its activities, Denver is attempting to vindicate and protect the "right to a vote free of arbitrary impairment," *Baker* v. *Carr*, 369 U.S. 186, 208 (1962), in that an inaccurate census count of the population of the City and County of Denver shall result in the improper apportionment and districting of congressional and state legislative representation. The

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[6] See 8 *Wigmore, Evidence* §2192 (McNaughton Rev. 1961).

states must, as a practical matter, rely on the federal census data for the purposes of congressional redistricting within each state. *Kirkpatrick* v. *Preisler*, supra; *Prigg* v. *The Commonwealth of Pennsylvania*, 41 U.S. 539 (1842). The Constitution and statutes of the State of Colorado require that census data be used in districting not only for congressional representation but also the representation of both houses of the State General Assembly. Colo. Constit. Art. V. Sect. 44 through 48; 2-1-101 C.R.S. 1973, et seq., as amended, and 2-2-101 C.R.S. 1973, et seq., as amended.[7]

Petitioners recognize that mathematical exactness or precision is "hardly a workable constitutional requirement," *Reynolds* v. *Sims*. 377 U.S. 533, 577 (1964), with respect to the census count of the population in the United States. But in this case, the evidence shows that there is substantial doubt as to the accuracy of the census for the City and County of Denver and that there is a practicable way to make the census more accurate. The statistical data from sources such as numbers of telephones, water taps, sewer taps, building permits, electric and gas connection and usage, and studies of population by traditional agencies of regional government, as well as the results of the special survey of Denver of one-third of the living units in the City and County of Denver belie the preliminary population figures of the Bureau.

The area which appeared to cause the inaccuracy of the Bureau was its deducing more of the living units of the City and County of Denver vacant than actually were vacant and therefore not counting the people who

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[7] Not only do the provisions of the Constitution and the laws as cited above require reliance on the Decennial Census for reapportionment, but the Census Bureau urged any agency other than it not to conduct its own census while the Census Bureau was so doing so as not to "create confusion." (J.A. 39).

reside in those living units. Denver proposed that these be verified as against the results of the City's special survey as well as for the remainder of the City. The Bureau balked at the ideas that it erred and that the information gathered by the City was valid and that any such verification would be worthwhile or produce results different from the preliminary figures.

The trial court disagreed with the Bureau after having heard testimony and received evidence on Denver's application for a preliminary injunction. The District Court found that while it may be that definitional differences between Denver and the Bureau as to what constitutes a "vacancy" may account for the difference in vacancy figures obtained by the Bureau and those obtained by Denver, there is no way that the actual effect of such definitional differences can be verified unless Denver can discover which dwellings the Bureau counted as vacant as of April 1, 1980.

The District Court found that to deny Denver discovery of the information concerning vacant units will essentially deny it any meaningful ability to challenge the Bureau's determinations. It recognized and stated in its order that extremely important constitutional rights are at stake in this case, includling representation in Congress and in the State Assembly.

The purpose of Title 13 of the United State Code is to enable and assure an accurate and complete enumeration of the population so that in districting for legislative representation, each person's vote will be equal to another's. However, in this case, the claim of the Bureau and the interpretation and application of the Court of Appeals of the confidentiality provisions of that statute impede the attainment of the goal of an accurate and complete enumeration.

Denver does not submit that the confidentiality provisions of Title 13 U.S.C. are themselves unconstitu-

tional, but only that the interpretation and application of those confidentiality provisions to the facts in this case result in an impermissible restraint on attaining the most accurate and complete enumeration which, as a practical matter, can be performed under these circumstances.

THE ADDRESSES OF LIVING UNITS IN THE CITY DEEMED TO BE VACANT ON APRIL 1, 1980 BY THE CENSUS BUREAU ARE NOT PROTECTED BY THE PRIVILEGE OF CONFIDENTIALITY OF SECTION 9 OF THE CENSUS ACT

The list of addresses of living units in the City and County of Denver deduced by the Bureau to be vacant on Census Day is not protected by a privilege of confidentiality which would prevent its disclosure to the City and County of Denver, as the Census Act does not prohibit the Bureau from providing such a list to Denver nor does it prohibit Denver from obtaining such a list through judicial process.

The addresses of living units in Denver were not obtained from questionnaires. The Bureau deduced that some 16,600 living units in the City and County of Denver contained no persons from the non-return of the mail out-mail back questionnaire forms and from its follow-up procedures. The deduction of the Bureau that there were some 16,600 vacant living units in Denver on Census Day (J.A. 61) does not differ from its other more notable deductive conclusions such as what percentage of us have migrated in a northwesterly direction or what percentage of us have fewer than three bathrooms in our homes — deductions which the Bureau characterizes as "statistical" — yet deductions that are also concluded from census data and deductions which are freely made public.

Denver does not seek any responses of census questionnaires which the Bureau may have used in

deducing that 16,600 living units were vacant. Denver does not desire to see the questionnaires, know the names or characteristics of respondents, nor what was responded. Denver simply wants to know the addresses of these units so that it can show that there were, in fact, people living in those living units who should have been counted, who should be considered in the uses that the census figures are put, especially regarding the allocation of legislative representation and the determination of the effect of a person's vote. The addresses were not obtained through the census questionnaire system.

Congress did not intend that this information be withheld. In *Cort* v. *Ash*, 422 U.S. 66 (1975) This Court set forth three factors for determining the congressional intent in enacting any particular legislation: the language of the statute, its legislative history, and the underlying purpose and structure of the statute.[8]

The words and phrases of §9 of the Census Act do not specify or imply any privilege, *United States* v. *Missouri Pacific R.R. Co.*, 278 U.S. 269, 277-278 (1929); especially when such a provision of the statute must be strictly construed, *St. Regis Paper Co.* v. *United States*, 368, U.S. 208, 218 (1961).

The Court of Appeals held that "[B]oth the history of the Census Act and the broad language of the confidentiality provisions of §9 make abundantly clear that Congress intended both a rigid immunity from publication or discovery and a liberal construction of that im-

[8] This Court has recently confirmed its analysis in divining congressional intent in order to determine whether to infer the right to contribution from the Equal Pay Act, 29 U.S.C. §206(d), and Title VII of the Civil Rights Act, 42 U.S.C. §2000e-2, *Northwest Airlines, Inc.* v. *Transport Workers Union of America*, 451 U.S._____, 67 L.Ed2d 750, 101 S.Ct. 1571, 49 U.S.L.W. 4383 (decided April 20, 1981); and in order to determine whether the Davis Bacon Act, 40 U.S.C. 276(a) confers a private right of action for back wages, *Universities Research Association* v. *Coutu*, 450 U.S._____, 67 L.Ed.2d 662, 101 S.Ct. 1451, 49 U.S.L.W. 4354 (decided April 6, 1981).

munity that would assure confidentiality." *McNichols* v. *Klutznick*, 644 F.2d 844, 845 (1981). An examination of the express words and phrases used in the Census Act shows that the confidentiality provisions of the statute provides only that (1) census information is to be used only for statistical purposes; (2) no one may publish information which identifies respondents to the census; and (3) no one without statutory authority may read individual reports.[9]

Denver will use these lists for precisely those statistical purposes for which that information is intended, i.e., to ensure an accurate count of the population of the City and County of Denver in the 1980 Decennial Census. Denver shall not, and does not ask that the Bureau, publish information which identifies respondents to the census; nor does Denver wish to read individual reports made to the Bureau by respondents during the 1980 Decennial Census.

The Bureau deduced that certain living units were vacant from its mail out-mail back and follow-up procedures. When the Bureau did not receive completed questionnaires from the living units to which they were mailed, temporarily employed and sparsely trained personnel from the Bureau attempted to determine the reason there was no response. Disclosing to Denver the addresses of those living units deduced to be vacant from the fact that the questionnaires were not mailed back and from the information gathered by these personnel will not necessitate, and will not lead to, disclosing the sources of the information gathered, much less the identities of those who provided the information. We must assume that the information did not come from the persons residing in the living units deemed to be vacant.

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[9] *Carey, et al.* v. *Klutznick, et al.*, No. 81-6042, Slip op. at 3 of concurring opinion of Judge Stewart (2nd Cir. June 12, 1981).

The Court of Appeals erred in admittedly allowing a "liberal construction" of those confidentiality provisions of the Census Act, contrary to This Court's directions in *St. Regis Paper Co.* v. *United States, supra,* at page 218:

> . . . Ours is the duty to avoid a construction [of the Census Act] that would suppress otherwise competent evidence unless the statute, *strictly construed,* requires such a result. (Emphasis added)

The legislative history of §9 reveals the intention of Congress to assure that respondents will not be identified as a result of replying to the census. In *St. Regis Paper Co.* v. *United States, supra,* This Court decided that, as then written, §9 did not protect copies of census questionnaires voluntarily retained by respondents. 368 U.S. at 218. Congress then enacted the paragraph following §9(a) (3) to overrule that case. The legislative history concerned with that amendment shows its limited purpose:

> The purpose of this legislation is to provide specifically that company-retained copies of census reports submitted to the Bureau of the Census shall have the same confidential status which is afforded to the original census reports . . .

S. Rep No. 2218, 87th Cong., 2nd Sess. 2 (1962), *reprinted in* [1962] U.S. Code Cong. & Admin. News 3188, 3189. The Department of Commerce request for enactment of this measure stated that, with the requested amendment, ". . . a respondent will be free to give information to Census for statistical purposes only, without fear that a copy of the return can be demanded by a regulatory agency and used against the

respondent." Letter from Secretary of Commerce Luther H. Hodges to President Lyndon B. Johnson, *reprinted in* [1962] U.S. Code Cong. & Ad. News 3190, 3191. The relationship between respondents to the census and the Bureau is repeatedly emphasized in Secretary Hodges' letter. *Id.* The statutory response to *St. Regis Paper Co.* was thus confined to the narrow holding of the case.

Although the *St. Regis* Court was specifically concerned with the relative protection afforded census forms retained by respondents and those held by the Bureau, This Court stated that "the prohibitions against disclosure contained in §9 . . . do not purport to generally clothe census information with secrecy." 368 U.S. at 217-18. This Court analyzed each of the three subsections of 13 U.S.C. §9. *Id.* at 215-16. The strict construction given to §9 by This Court did not occasion any fundamental re-thinking or clarification of the statute. The statute could have been amended to include a blanket prohibition on dissemination of the information obtained by the Bureau from any source, for any purpose. But Congress did not do so. The Committee on Post Office and Civil Service of the House of Representatives expressly rejected a statutory revision that would prevent use of "all copies of [census] information, reports and other data" in judicial and administrative proceedings. H.R.Rep.No. 2437, 87th Cong., 2nd Sess. 1-2 (1962); H.R.Rep.No. 10569, 87th Cong., 2nd Session (1962), printed in Hearing Before the Comm. on Post Office and Civil Serv., Confidentiality of Census Reports, 87th Cong., 2nd Sess. (1962).

The Court of Appeals cites only *Seymour* v. *Barabba*, 559 F.2d 806 (D.C. Cir. 1977) as authority for its liberal interpretation of an absolute interdiction of the confidentiality provisions of 13 U.S.C. §9. Unlike the instant case, the plaintiffs in *Seymour* were not seeking disclosure of census information for statistical pur-

poses; rather those plaintiffs sought names and addresses for the purpose of sending notices to potential class members in an anti-trust action. Moreover, the plaintiffs in *Seymour* sought disclosure not just of addresses but of the names and addresses of companies the Bureau had placed in twenty-one substantive categories. The categories described the businesses of the firms listed, and, hence, obviously reflected the information provided by the companies in the census reports, but more importantly, disclosed the identity of the respondents to the census questionnaires.

The concept that the confidentiality provision of the Census Act is restricted to the protection of the identities of the respondents has been propounded in the Federal District Courts. See *United States* v. *Bethlehem Steel Corp.*, 21 F.R.D. 568 (S.D.N.Y. 1958); *United States* v. *Littles*, 321 F.Supp 388 (D.Del 1971).

That the list of addresses of living units in the City and County of Denver deduced by the Bureau to be vacant on Census Day may be provided to the City and County of Denver for the purpose of assuring the most accurate enumeration of the population of the City and County of Denver as is possible is patent, not only because the Census Act does not prohibit the Bureau from providing such a list to Denver, but also since it is, according to the suppositions of the Bureau, information concerning non-existent persons.

That there are substantial constitutional rights at stake in this litigation was not only found and stated by the District Court (J.A. 115), but is also set forth and argued herein *supra:* every person's vote must be equal to another's to the greatest extent feasible. The District Court recognized that the fundamental rights involved here could not be subordinated to an administrative desire to avoid scrutiny and was correct. The Court of Appeals opted not to do so, electing instead to

stamp the rigid position of the Bureau as required by the 10th Circuit's liberal construction of the statute.

THE ORDER OF THE DISTRICT COURT DID NOT VIOLATE ANY PRIVILEGE

The District Court balanced the interests at stake in the issue of disclosing the list of vacant living units and found for Denver. In so doing, it also even-handedly provided conditions of disclosure which would, under *any* interpretation of the confidentiality provisions of the Census Act, satisfy the requirements of that statute.

The District Court determined that the withholding of the addresses of vacant living units would deny Denver any meaningful ability to challenge the Bureau's determinations of the population of the city and that the discovery of those addresses is clearly relevant and indispensable to Denver's case. The District Court further found that the purposes of Section 9 of Title 13 U.S.C. can be maintained, and conditioned and subjected the discovery order by (1) allowing the Bureau to provide lists of vacant units as opposed to the Follow-up Address Register itself, (2) allowing the Bureau to shield the identity of respondents to the census, (3) requiring the employees, officers and agents of the City who would have access to those addresses to be sworn to the same oath of secrecy as are personnel of the Bureau, (4) restricting access to the information to those persons so sworn to secrecy, (5) subjecting those persons to contempt of the Court for violation of the non-disclosure limitations, (6) restricting the use of the information to the seeking of the correct population figure for the city, (7) prohibiting the publication of the addresses, (8) allowing personnel of the Bureau to monitor and participate in the activities of Denver in using the information and (9) requiring Denver to pay

the expenses associated with the disclosure and the use of the information in the event that Denver fails to succeed in showing that its population exceeds 500,000.

Denver submits that this information shall be as secure as, if not more than, it is presently. The safeguards include not only those which may be applicable to personnel of the Bureau, but also the superintendence and order of the District Court. The integrity and the appearance of integrity of census data will be honored and will remain whole.

CONCLUSION

Your Petitioners pray the Judgment of the U.S. Court of Appeals for the Tenth Circuit be reversed and the cause remanded to the Court of Appeals with instructions to vacate its stay of the Order of the U.S. District Court for the District of Colorado.

Respectfully submitted,

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July, 1981

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

Civil Action No. 80-C-1151

WILLIAM H. MCNICHOLS, JR., individually and in his official capacity as Mayor of the City and County of Denver, et al.,

PLAINTIFFS,

VS.

PHILIP M. KLUTZNICK, in his official capacity as the Secretary of the U.S. Department of Commerce, et. al.,

DEFENDANTS.

ORDER

The plaintiffs in this action challenge the population count reached by the Bureau of the Census for the City and County of Denver, Colorado. The plaintiffs filed a motion for temporary restraining order and a motion for preliminary injunction. In connection with those motions, the Court has heard extensive evidence regarding the Census Bureau's methodology and the City's challenges to the census count. The Court is therefore well acquainted with the issues ultimately to be raised on the merits.

In addition, the plaintiffs have filed a request for production of documents, together with a motion to have production expedited because of the short time period in which census challenges must be determined. In that request, the plaintiffs seek the "Follow-Up Address Registers" (FARs) and "any and all other documents relating to the taking of the 1980 Decennial Census in the City and County of Denver."

The thrust of the City's challenge to the census is directed to the Bureau's determination that there were over 16,000 vacant housing units in the City on April 1, 1980, the effective date of the census. The City's trained and experienced real estate assessment personnel have conducted actual checks of about one-third of Denver's residential real estate units, and as a result of that survey, the City contends that the Bureau has "over-counted" vacancies by a factor of 46%. However, it has been impossible for the City to challenge the Bureau's finding that any particular housing unit was "vacant" on April 1, 1980 because the Bureau has declined to inform the City which units it counted as vacant. For the purpose of contesting the vacancy count, the City seeks to discover the list or register of those dwellings defined by the Bureau as "vacant" in the 1980 census. The Court therefore concludes that the request for production essentially relates only to the FARs, or other documents which contain the vacancy information, and this Order is directed only to those documents. The City has conceded that production of the FARs will satisfy the instant discovery request, despite the overbreadth of its original request for production.

The Bureau in refusing the discovery request, relies primarily on the contention that the information sought is confidential because it falls within the meaning and intent of 13 U.S.C. section 9. The Bureau argues that Congress provided for confidentiality of all census return information in order to assure voluntary compliance by census respondents so that accurate data can be compiled, and that section 9 prohibits the discovery here sought.

In response, the City contends that the purpose of the confidentiality provision would not be undercut by providing vacancy lists, since neither the names of

census respondents nor answers to census questions need be provided. In addition, the City argues that 13 U.S.C. section 9 does not bar this discovery because that section only prohibits "use [of] the information furnished for any purpose other than the statistical purpose for which it is supplied." The City asserts that this is precisely the purpose, and the only purpose, for which the information will be used.

The Court has considered carefully the foregoing arguments as well as the evidence presented by both sides in the substantial proceedings held to date. In particular, the Court has considered evidence presented by the Bureau which indicates that definitional differences between the parties as to what constitutes a "vacancy" may account for the difference in vacancy figures obtained by the Bureau and those obtained by the City. Despite this evidence, it appears to the Court that there is no way that the actual effect of the definitional difference can be verified unless the City can discover the FARs, which will tell the City *which dwellings* the Bureau counted as vacant as of April 1, 1980. In other words, to deny the City discovery of this information will essentially deny it any meaningful ability to challenge the Bureau's determination. Extremely important constitutional and statutory rights are at stake in this case. The final census count will affect Denver's representation in Congress and both houses of the Colorado General Assembly for the ensuing decade. Moreover, the population figure 500,000 is a threshold of city size affecting both state and federal grants. The Bureau proposes a 1980 census for Denver just over 491,000, whereas Denver claims its population is over 500,000 and that the vacancies in dispute would make up the difference if fully counted. The Bureau has admitted that it undercounted by about 2.5% as a national average in 1970. Obviously

an adjustment of that magnitude also would put Denver over 500,000.

Considering the intent and purpose of the confidentiality requirements of 13 U.S.C. section 9, the Court concludes that the purposes of that section can be maintained in this case without denying the City the right to discovery of documents clearly relevant and indispensable to its case.

Accordingly, it is

ORDERED that the defendants shall produce the FARs for the City and County of Denver to the plaintiffs, or the defendants may, alternatively, produce a list derived from the FARs which simply lists the addresses of those living units in the City and County of Denver which the Bureau has determined to have been vacant on April 1, 1980;

ORDERED that the defendants shall delete from said information any and all names of persons or other references which might identify respondents to the census, either directly or indirectly;

ORDERED that every employee, officer, or agent of the City and County of Denver before having access to the information provided shall be sworn to the same oath of secrecy and confidentiality as required of personnel of the Bureau of the Census;

ORDERED that the plaintiffs shall not allow any person subject to their control and not subject to such oath access to the information made available hereunder;

ORDERED that a copy of this Order shall be served upon every employee, officer or agent having access to the information provided by the Bureau, and every such employee is hereby ORDERED not to disclose such information to anyone not subject to the oath of confidentiality;

ORDERED that the information provided pursuant to this Order shall not be used for any purpose except

to seek the correction or adjustment of the population figures for the City and County of Denver for the 1980 census;

ORDERED that the information provided hereunder shall not be publicized or made public in any way;

ORDERED that the defendants may at their option provide one more of their employees, officers or agents to accompany each employee, officer or agent of the plaintiffs in checking and verifying the April 1, 1980, status of occupancy or vacancy of the living units at issue, and in the event that the defendants elect to follow this procedure and the population of the City and County of Denver is ultimately determined to be under 500,000, the defendants may apply to the Court for reimbursement by the City of the reasonable and necessary expenses incurred in making this cooperative effort with the plaintiffs;

ORDERED that the plaintiffs, by accepting the information made available through this Order, accept as a condition thereof the foregoing Order regarding payment of the defendants' reasonable and necessary expenses;

ORDERED that this Order shall be effective immediately as of the date written below; provided, however, that enforcement of the Order is hereby stayed for a period of seven days from that date, and

ORDERED that a copy of this Order shall be served immediately on the United States Attorney for the District of Colorado.

Finally, the Court finds and concludes, pursuant to 28 U.S.C. section 1292(b), that this Order involves a controlling question of law as to which there is a substantial ground for difference of opinion, and that an immediate appeal from this Order may materially advance the ultimate termination of the litigation.

DATED at Denver, Colorado, this 17 day of September, 1980.

BY THE COURT:

/s/ Jim R. Carrigan
JIM R. CARRIGAN, Judge
United States District Court

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 80-2023

WILLIAM H. MCNICHOLS, JR., individually and in his official capacity as Mayor of the City and County of Denver, et al.,

PLAINTIFFS-APPELLEES,

vs.

PHILIP M. KLUTZNICK, in his official capacity as the Secretary of the U.S. Department of Commerce, et. al.,

DEFENDANTS-APPELLANTS.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
(D.C. Case No. 80-C-1151)

John F. Cordes (Alice Daniel, Assistant Attorney General, and Leonard Schaitman, Attorney, Civil Division, Department of Justice; and Joseph F. Dolan, United States Attorney for the District of Colorado, with him on the briefs), Civil Division, Department of Justice, Washington, D.C., for Defendants-Appellants.

George J. Cerrone, Jr., Assistant City Attorney (Max P. Zall, Attorney for the City and County of Denver, with him on the brief), Denver, Colorado, for Plaintiffs-Appellees.

Before BARRETT, DOYLE and McKAY, Circuit Judges.

McKay, Circuit Judge.

[Decided March 17, 1981]

The action underlying this properly certified interlocutory appeal is a challenge to the population count reached by the Bureau of Census for the City of Denver, Colorado. The focal point of the litigation at this stage is the plaintiffs' charge that the Bureau has "over-counted" the number of vacant housing units in Denver. The plaintiffs, asserting their interests in the census count's effect on congressional representation and in various federal grants based on census figures, sought discovery of the Bureau's list of addresses of Denver's allegedly vacant housing units. The information sought by the plaintiffs is derived from the Bureau's questionnaire program and follow-up interviews. The Bureau resisted discovery because of the express prohibitions of 13 U.S.C. § 9(a) which provides:

> 9. Information as confidential; exception
>
> (a) Neither the Secretary, nor any other officer or employee of the Department of Commerce or bureau or agency thereof, may, except as provided in section 8 of this title—
>
> (1) use the information furnished under the provisions of this title for any purpose other than the statistical purposes for which it is supplied; or
>
> (2) make any publication whereby the data furnished by any particular establishment or individual under this title can be identified; or
>
> (3) permit anyone other than the sworn officers and employees of the Department or bureau or agency thereof to examine the individual reports.
>
> No department, bureau, agency, officer, or employee of the Government, except the Secretary in carrying out the purposes of this title,

> shall require, for any reason, copies of census reports which have been retained by any such establishment or individual. Copies of census reports which have been so retained shall be immune from legal process, and shall not, without the consent of the individual or establishment concerned, be admitted as evidence or used for any purpose in any action, suit, or other judicial or administrative proceeding.

Notwithstanding the express language of the statute and the "emphatically expressed intent of Congress to protect census information," *Seymour v. Barabba*, 559 F.2d 806, 809 (D.C. Cir. 1977), the district court:

> ORDERED that the defendants shall produce the FARs[1] for the City and County of Denver to the plaintiffs, or the defendants may, alternatively, produce a list derived from the FARs which simply lists the addresses of those living units in the City and County of Denver which the Bureau has determined to have been vacant on April 1, 1980 . . .

Record, vol. 1, at 37. The court's order tacitly acknowledged that it constituted an evasion of congressionally mandated confidentiality by directing that plaintiffs' personnel who received the address lists should be sworn to the same oath of secrecy and confidentiality as required by the personnel of the Bureau of the Census and by otherwise limiting any further publication of the ordered information.

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[1] FARs are "follow-up address registers" representing updated master address lists which include the Bureau's classification of housing units as either vacant or occupied.

There can be no question that Congress has the power to make census information gathered at its direction immune from discovery. Both the history of the Census Act and the broad language of the confidentiality provisions of § 9 make abundantly clear that Congress intended both a rigid immunity from publication or discovery and a liberal construction of that immunity that would assure confidentiality. *See Seymour v. Barabba,* 559 F.2d 806 (D.C. Cir. 1977).

The plaintiffs contend, however, that their request for a list of vacant housing units should be honored. The principal thrust of the plaintiffs' argument is that the information should be released because without it they cannot meaningfully challenge the Bureau's determination of Denver's population. Congress has neither made nor implied such an allowance in its prohibition and no authority is given for the notion that Congress is constitutionally required to yield to such an argument. The government has promised its citizens that census information will be kept confidential. 13 U.S.C. §§ 8(b), (c), 9(a). In exchange for and in reliance on this promise, citizens cooperate with the government's census taking efforts relatively free of inhibitions that might otherwise distort their disclosures. In these times when confidence in the government's resolve to keep its promises to its citizens is not notorious, we should not readily find excuses to abandon or prohibit the enforcement of those promises. We do not believe that in the face of the congressional prohibitions, the trial court has authority to substitute its own techniques for protecting the confidentiality mandated by the statute.

The plaintiffs also suggest several interpretations of § 9(a) that lend support to the district court's order. We do not believe that the statute permits us

to conclude that the plaintiffs' intended use constitutes one of the "statistical purposes for which [the information sought] is supplied." 13 U.S.C. § 9(a)(1). Nor are we impressed that the word "publication" contained in 13 U.S.C. § 9(a)(2) should be so narrowly construed as to suggest it means only advertising the information in some press or broadcast media. The word obviously means disclosure to anyone other than those persons authorized in the statute itself.

The plaintiffs have argued that the information sought is not within § 9(a)'s ambit because it was not "furnished" by respondents. We do not think that the word "furnished" should be so narrowly construed, particularly in light of the provisions of § 8(b) which make clear that the prohibition is against the disclosure of "information reported by" respondents. The record clearly reflects that the information ordered released was disclosed by Census respondents.[2]

No doubt the cities and counties and their residents face difficult financial problems which may be substantially affected by the uses to which census data will be put. Their remedies, if any, must lie in some device other than devices expressly prohibited by a congressional exercise of constitutional authority. The order of the district court violates the provisions of 13 U.S.C. § 9 and must therefore be reversed.

[2]Plaintiffs have also argued that the challenge to the court's order is moot or that § 9's requirements have been waived because of some alleged breaches of the prohibitions of § 9 by Bureau employees in New Mexico. The record reveals that there is no merit to this argument.